ELLARIOUS GEORGE FERNANDEZ

v.

EASTERN & ORIENTAL HOTEL [1951] SDN. BHD. & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 579 OF 1985]
14 NOVEMBER 1985

CIVIL PROCEDURE: *Injunction - Interlocutory - Tenancy - Eviction by landlords - Access and occupation - Claim for compensation - Control of Rent Act 1966 - Just and equitable - Status quo.*

This is an application for a mandatory interlocutory injunction by the plaintiff who being a tenant of certain premises, claims to have been ejected by his landlords. Consequently, the plaintiff is claiming vacant possession against the 1st defendant (the landlords) and the 2nd defendant (the present occupants). The plaintiff had occupied the premises for 30 years and operated the business of a hairdressing saloon, initially as a partner and later on as a sole proprietor. He had also paid substantial sums of money for the tenancy of the premises.

In 1984 the 1st defendant informed the plaintiff that they required the premises for their own use as soon as possible and the plaintiff was agreeable to this, provided he was paid a sum of RM170,000. The following month, the plaintiff received a notice to quit from the 1st defendant's solicitors, requiring him to yield vacant possession for allegedly being in arrears with payment of rent for more than 14 days. There was a conflict of evidence as to whether or not the 1st defendant's solicitors had agreed to pay the plaintiff the sum of RM170,000. The plaintiff, after a few enquiries, was told by the 1st defendant's solicitors that there was no right of compensation. The plaintiff also claimed that on 3 November 1984 he discovered, for the first time, that the 1st defendant had broken into the premises and retaken possession. The writ of mandatory injunction was then issued in 1985.

Held:

[1] The general purpose of an interlocutory injunction, whether prohibitory or mandatory, is to preserve the *status quo* in as equitable a manner as the circumstances permit pending the final disposal of the trial.

[2] Taking into account certain undisputed and admitted facts, the plaintiff has made out an "unusually sharp and clear" case that he never intended to surrender the premises for nothing. He was expecting payment of a sum of money, whatever that may be, failing which he had every intention to return to the premises.

[3] The legal significance of the refusal of the plaintiff to give up the keys to the premises is illustrated by *Brown v. Burtinshaw* which is an authority for the proposition that the tenant's agreeing to give up the key, but subsequent refusal to do so, is no acquiescence in the notice to quit served upon him and no surrender of his tenancy.

[Order in terms of prayers (1) & (2) but operation to be suspended until 31 October1986. Undertaking of damages by plaintiff. Defendants to pay plaintiff costs of this application. Order for early trial.]

Cases referred to:

Luganda v. Service Hotels Ltd. [1969] 2 Ch 209
Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chai Nyen Yioh [1975] 2 MLJ 109
Canadian Pacific Railway v. Guad [1949] 2 KB 239
Shephard Homes v. Sandham [1971] Ch 340
Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch 233
Gale v. Abbott [1862] 6 LT 852
Bonner v. Great Western Railway Co. [1883] 24 Ch D1
American Cyanamid Co. v. Ethicon Ltd. [1975] All ER 504
Brown v. Brash & Anor. [1948] 2 KB 247
Brown v. Burtinshaw [1826] 7 Dow & Ry KB 603
Price's Patent Candle Co. Ltd. v. London County Council [1908] 2 Ch 526

For the plaintiff - Mr. P. Navaratnam & Mr. V. Sithambaram; M/s. Kumar & Co.
For the 1st defendant - Mr. P.R. Manecksha; M/s. V.P. Nathan & Partners
For the 2nd defendant - Mr. Ranjit Singh; M/s. Jag-Jit Singh & Co.

JUDGMENT

Edgar Joseph Jr J:

This is an application for a mandatory interlocutory injunction by the plaintiff, Mr. Ellarious George Fernandez, who claims that as a tenant of premises subject to the Control of Rent Act 1966 ("the Act") and having been ejected by his landlords, contrary thereto, he is entitled to be restored to access and occupation pending the determination of an action for possession brought by him.

More particularly, the action for vacant possession is against the First defendant ("D.1"), the landlords, and the Second defendant ("D.2"), the present occupants, of certain premises comprised in the ground floor of the Eastern & Oriental Hotel Building ("the premises") situated in Farquhar Street, Georgetown, Penang, where Mr. Fernandez had carried on his business of a hairdressing saloon.

It goes without saying, that if Mr. Fernandez is correct in his contentions, then he would be entitled, at the final hearing, to a permanent mandatory injunction requiring the evictor to allow him access and occupation since this is the appropriate remedy for the occupant of premises evicted contrary to the Act. It follows that he would not be confined to his remedy in damages since this would encourage the very mischief which security of tenure under the Act was designed to confer. I am supported in that conclusion by the case of *Luganda v. Service Hotels Ltd*. [1969] 2 Ch 209. The passage in the judgment of Lord Denning MR to which I wish to make reference, reads as follows:

> Mr. Luganda is *prima facie* entitled by statute to security of tenure of this room. It was unlawful for the management to lock him out of it: see section 30 of the Act of 1965. They were wrong to take the law into their hands. If the management had not changed the lock and Mr. Luganda was still in occupation - I am sure that the Court would have granted an injunction to prevent the management from locking him out. They should not be in a better position by wrongfully locking him out. As Lord Uthwatt said in *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd*. [1948] AC 173, 203: "In a Court of equity, wrongful acts are no passport to favour." We must see that the law is observed. To do this, we should, I think, order that Mr. Luganda should be restored to his room...

Clearly, therefore, damages alone are often an insufficient remedy for the protection of the occupier's legal rights. Should it be otherwise, the denouncement could be tantamount to enabling the wrong-doer to buy out his victim compulsorily at a price fixed by the Court. Accordingly, the injunction in all its varying forms, being an order of the Court restraining the commission or continuance of some wrongful act or omission, is of paramount importance in eviction cases.

I make these observations because obviously if Mr. Fernandez's remedy at the final hearing lies in an award of damages, then the question of granting him interlocutory mandatory relief at this stage cannot arise. Indeed, as a mandatory interlocutory injunction is a very exceptional form of relief *(Wah Loong (Jelepang) Tin Mine Sdn. Bhd. v. Chai Nyen Yioh* [1975] 2 MLJ 109; *Canadian Pacific Railway v. Gaud* [1949] 2 KB 239), the case must be "unusually sharp and clear" *(Shephard Homes v. Sandham* [1971] Ch 340), and the Court must feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted. Should any doubt arise on this score then the interlocutory application must surely fail *(Hounslow London Borough Council v. Twickenham Garden Developments Ltd*. [1971] Ch 233). There are good reasons for this since the Court will not ordinarily compel a defendant to do so serious a thing as to undo what he has done except after a full hearing. *(Gale v. Abbott* [1862] 6 LT 852). However, the stronger the case of the plaintiff that the matters complained of are unlawful the more likely it is that the Court will find it just and equitable that his interest should be protected by the immediate issue of an injunction *(Bonner v. Great Western Railway Co*. [1883] 24 Ch D1).

Having said that, it is only right to say, at the risk of being trite, that the general purpose of an interlocutory injunction, whether prohibitory or mandatory, is to preserve the *status quo* in as equitable a manner as the circumstances permit pending the final disposal of the trial. The *status quo* in this sense may mean that prevailing at the time of the interlocutory application or just before the wrongful acts complained of occurred.

That brings me to the particular circumstances of this case.

The application before me specifically prays for the following orders:

(1) that the defendants whether by themselves or their servants or agents or otherwise howsoever be restrained by injunction from trespassing or remaining in occupation of the plaintiff's barber shop in the E & O Hotel until after the trial of this action or until further order;

(2) that the defendants do forthwith remove their goods from the said premises and re-deliver up possession thereof to the plaintiff.

In order to elucidate the manner, I shall now refer to the facts which can be garnered from the various affidavits filed in support of and in opposition to this application.

I shall first consider the case for the plaintiff.

Thirty years ago, Mr. Fernandez went into occupation of the premises and commenced to operate therein the business of hairdressing saloon. He did so, at first, in partnership with another individual, until 9 March 1955, and thereafter he continued as sole proprietor and tenant of the business and premises respectively.

Naturally, Mr. Fernandez did not secure the tenancy of the premises for nothing. In fact, he paid two substantial sums of money for this purpose.

In the first place, he and his partner paid to one T.R. Suppaian, a previous tenant of the premises, a sum of RM19,000 as consideration for the assignment of the tenancy and the hairdressing saloon business, pursuant to an agreement in writing dated 12 October 1953 being Ex. F1 annexed to encl. 3.

In the second place, he bought over his partner's half share for a consideration of RM3,500 pursuant to an assignment in writing dated 9 March 1955, being Ex. F2 annexed to Encl. 3 and thereby became the sole proprietor and tenant of the business and premises respectively.

According to Mr. Fernandez, ever since he went into occupation, he paid D.1 a monthly rental of RM50 per month but then, some time in 1982, D.2, who carried on a car hire business under the name of "Avis RC", through its Manager, made an offer of RM130,000 to take over the tenancy of the premises but this was declined. However, D.2's Manager, in his affidavit (encl. 26) had denied that he made any such offer.

Then followed a series of events which culminated in the institution of the action for possession to which I have already referred. These events may be stated, briefly, thus:

In March 1984, D.1, through its Assistant Manager, told Mr. Fernandez that they required the premises for their own use as soon as possible. Mr. Fernandez said he was agreeable, provided he was paid RM170,000.

The very next month, specifically, on or about 2 April 1984, Mr. Fernandez received a notice to quit, from D.1's solicitors, M/s. Balamahesan & Co., requiring him to yield vacant possession of the premises on 30 June 1984, on the ground that he had been allegedly in arrears with payment of rent for more than fourteen days.

Mr. Fernandez further alleged that in early May 1984, on the instigation of D.1's clerk, he went to see Mr. Balamahesan who immediately enquired how much compensation he required to deliver vacant possession. Mr. Fernandez said he asked for RM170,000 and explained that he had been carrying on business at the premises since 1953 and together with his partner had paid RM19,000 for it.

On the other hand, Mr. Balamahesan's version (confirmed by his Legal Assistant, Miss Shyama in her affidavit encl. 6) of the events at this meeting appears from an attendance slip in his personal handwriting being Ex. BM1 annexed to encl. 5 which reads:

> Fernandez/Balamahesan
> 30 April 1984 at 4.00 p.m.
> wants RM170,000 tenant from 1954.
> Says he paid RM24,000 to previous tenant.
> signed by,
> Balamahesan.
> Engaged half hour.

There was, however, an acute conflict of evidence as to whether or not Mr. Balamahesan had, as solicitor for D.1, agreed to pay Mr. Fernandez the sum of RM170,000. Mr. Fernandez avers that there was such an agreement; Mr. Balamahesan that there was nothing of the sort. Clearly, this conflict cannot be resolved in the present state of the evidence and must await the trial.

Be that as it may, Mr. Fernandez further alleged, that relying on the aforesaid promise, he dismissed his two barbers, Ramu and Ravindran, removed a few items of furniture, consisting of four barber chairs, one water heater and one large wall mirror and locked up the premises in preparation for delivery of vacant possession. This was on or about 30 May 1984.

Mr. Fernandez then went on to say that on or about on 28 June 1984, he called on Mr. Balamahesan to enquire whether compensation would be paid but was told to return in a few weeks' time. Similarly Mr. Fernandez said that early in August 1984, he again called on Mr. Balamahesan and enquired when he could expect payment but was met with an angry reply, "not to come and pester him anymore" and that "there was no right of compensation."

Accordingly, Mr. Fernandez consulted his then solicitors, M/s. R. Rajasingam & Co., who replied by letter dated 8 August 1984, being Ex. F6 annexed to encl. 3 addressed to M/s. Balamahesan & Co., stating there was no question of rent being in arrears as D.1 had refused to accept the tender of the same and that consequently, the notice to quit would not be complied with.

Mr. Fernandez has insisted that he intended to resume his hairdressing business at the premises but, as his former employees had moved, he had difficulty doing so.

Events then came to a head for, on 3 November 1984, Mr. Fernandez claimed that he discovered, for the first time, that D.1 had broken into the premises and retaken possession. This led him to make a police report, two days later, in the hope that some action would be taken but the police did nothing of the sort. So, Mr. Fernandez was obliged, once again, to consult his solicitors. As a result, the writ herein was issued on 25 May 1985, claiming, *inter alia*, a mandatory injunction that he be put back in possession of the premises.

I must now turn to consider the case for D.1 and D.2. This appears sufficiently from the affidavits affirmed to by one Mr. Don Chan, General Manager of D.1, by Mr. Balamahesan, by Miss Shyama and by Mr. T.R. Hepworth, formerly a Legal Adviser to D.1.

I hope it is not an unfair summary of these affidavits if I said that they amounted to this: Upon receipt of the notice to quit, it is admitted that Mr. Fernandez did, on 30 April 1984, call on Mr. Balamahesan and demand payment of compensation in the sum of RM170,000 for vacating the premises.

Mr. Balamahesan followed this up with a letter dated 30 April 1984, addressed to Mr. Don Chan, the General Manager of D.1 being Ex. BM2 annexed to encl. 5, which merits reproduction in full. It reads:

> Don H.B. Chan.
>
> Dear sir,
>
> **Re: barber shop**
>
> We refer to the above matter and we had occasioned a visit by Mr. G. Fernandez in respect of the above matter. Mr. Fernandez has informed us that he will vacate the said premises if he is paid a sum of RM170,000/xx (Ringgit: Hundred and seventy thousand dollars only). The reasons he gave being diverse and we are of the view that he will vacate the premises without a fight.
>
> We would be obliged if you could kindly let us have your instructions please.
>
> yours faithfully,
>
> signed Balamahesan & Co.

I have already mentioned that Mr. Balamahesan strongly refutes Mr. Fernandez's allegation that he had, as solicitor for D.1, promised to pay the RM170,000 by way of compensation; on the contrary, he states that he told Mr. Fernandez that the claim to compensation was baseless.

In spite of this, Mr. Balamahesan states that on 28 June 1984 Mr. Fernandez met him at the reception area of his office, saying, that, "he had taken all his stuff and vacated and that on 30 June 1984, he will hand the keys over to the reception desk of the hotel."

However, no attendance slip was prepared as regards this meeting because, according to Mr. Balamahesan, he was in a hurry and had an urgent meeting to attend.

Be that as it may, Mr. Balamahesan does admit that on 8 August 1984, Mr. Fernandez did call on him and, according to his own attendance slip, being Ex. BM4 annexed to encl. 5, enquired, "when he can get the money." Mr. Balamahesan then told him, "There is no money due and payable... that he had vacated... and the matter is closed", to which Mr. Fernandez replied, he would see the Manager first and then a lawyer to take proceedings, I consider this attendance slip sufficiently important to merit reproduction in full. It reads:

> 8 August 1984.
> Time 10.30 a.m.
> Mr. Fernandez came in at 10.20 and wanted to know when he can get the money. I told him that there is no money due and payable to him and that he has vacated the premises and the matter is closed.
>
> He said he will see the Manager first and then a lawyer to take proceedings.

Then, on 9 July 1984, events took a somewhat dramatic turn for, as I have already said, at about 11.00 a.m. that day, with the assistance of a locksmith, Mr. Don Chan gained entry to the premises. Also present with him on this occasion, though they remained just outside the premises, were Mr. Balamahesan and Mr. Hepworth.

Upon entering the premises, Mr. Don Chan said in his affidavit (encl. 5) that he was astonished to see the disaster therein and he referred to photographs taken then, being Ex. D4A to E annexed to encl. 4.

In his affidavit, (encl. 21) Mr. Hepworth added that there was no equipment nor account books or receipts lying in the premises at the time when Mr. Don Chan gained entry and that Mr. Fernandez's allegations to the contrary were wholly untrue.

Mr. Hepworth further stated that he had been a regular customer of Mr. Fernandez's shop since 1970 and recalled that there used to be two barbers working there but, from early 1984, there was only one.

It appeared to him, so he said, that Mr. Fernandez's business was in a bad way as, more often than not, there were no customers in the shop whenever he visited it.

He confirmed, that for several years, he had been a Legal Adviser and Solicitor to D.1, when he was practising as an Advocate and Solicitor and, in such capacity, he had in September, 1974, sent a notice to quit to Mr. Fernandez as the latter was in arrears with payment of rent and electricity charges in the sum of RM187.32.

Such being the law and the rival versions of the facts, I now come to the final question in this case: is it just and equitable to grant a mandatory interlocutory injunction and so preserve the *status quo* pending the determination of the suit herein? In considering this question, I ask myself, on all the evidence: what is the strength of the plaintiff's case?

I begin by reminding myself of what Lord Diplock said in his speech in *American Cyanamid Co. v. Ethicon Ltd*. [1975] All ER 504, "It is no part of the Court's function at this stage of the litigation" - that is in considering a motion for an interlocutory injunction, I interpolate - "to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

Accordingly, what I propose to do is to base my decision on the following plain facts which are either undisputed or admitted:

Firstly, I have already mentioned that Mr. Fernandez paid two substantial sums of money in order to secure the premises and the business of the hairdressing saloon carried on therein.

Secondly, Mr. Fernandez did carry on the hairdressing business at the premises for nearly 30 years ending in June, 1984.

Thirdly, it was alleged by Mr. Fernandez, and not challenged by D.1, that upon receipt of the notice to quit, he was summoned by D.1's clerk to call on their solicitors. Mr. Fernandez duly complied and made the demand of RM170,000 as consideration for yielding vacant possession of the premises. This was on 30 April 1984.

Fourthly, as a result of this meeting, Mr. Balamahesan formed the distinct that Mr. Fernandez "would not vacate the premises without a fight." So convinced was he of this that he wrote to his client, D1, expressly to that effect, when seeking instructions (see Ex. BM1 annexed to encl. 5 reproduced above).

Fifthly, Mr. Don Chan's response to D.1's solicitor was a short letter dated 2.5.84, being Ex. D.2 annexed to encl. 4, in which he said, "As Mr. E.G. Fernandez has requested for a wholly unreasonable and excessive sum of RM170,000, please commence proceedings as previously discussed, as soon as possible." This would suggest that D.1 was prepared to pay Mr. Fernandez something by way of compensation for vacating the premises but nothing like RM170,000.

Sixthly, it is clear that Mr. Fernandez did by 30 June 1984, dismiss his two barbers and remove his four barber chairs, one water heater, a large wall mirror, and lock up the premises. The state of the premises then is clearly reflected in the photographs to which I have referred.

Seventhly, at about this time - according to Mr. Balamahesan it was 28 June 1984 - Mr. Fernandez met Mr. Balamahesan at the reception area of the latter's office, saying that he had taken all his stuff, that he would hand over the keys two days later at D.1's reception desk which, incidentally, was just next door.

Significantly, however, Mr. Fernandez never did hand over the keys and continues to retain them.

Eighthly, nevertheless, on 9 July 1984, Mr. Don Chan, with the help of a locksmith, gained entry to the premises and took the photographs concerned.

Ninethly, D.1 then resumed possession of the premises and purported to let them out to D.2 pursuant to an agreement in writing dated 1 November 1984 for a period of two years at a quarterly rental of RM3,600.

Tenthly, the matter did not rest there for, as late as 8 August 1984, Mr. Fernandez did call on Mr. Balamahesan wanting to know - and I quote the attendance slip being Ex. BM4 annexed to encl. 5 - "when he can get the money."

Upon the above undisputed and admitted facts, I consider that the plaintiff has made out an "unusually sharp and clear case" that he never intended to surrender the premises for nothing. He was expecting payment of a sum of money, whatever that may be, failing which he had every intention to return to the premises, that is to say, an *animus revertendi* within the principles enunciated in *Brown v. Brash & Anor*. [1948] 2 KB 247.

I cannot help observing that it strains credibility to think that the plaintiff who had invested two substantial sums of money in securing the premises where he carried on his business for nearly thirty years would be prepared to vacate them for nothing, just because he was allegedly in arrears with payment of a comparatively trifling sum of rent, water and electricity charges.

I am fortified in my conclusions regarding this part of the case by the refusal of the plaintiff to give up the keys to the premises.

The legal significance of this is illustrated by the case of *Brown v. Burtinshaw* [1826] 7 Dow & Ry KB 603 which is authority for the proposition that the tenant's agreeing to give up the key, but subsequent refusal to do so, is no acquiescence in the notice to quit served upon him and no surrender of his tenancy.

Upon the undisputed and admitted fact aforesaid, I feel a high degree of assurance that at the final hearing, the plaintiff will be able to establish that the conduct of D.1 in breaking and entering the premises constituted a breach of the implied covenant of quiet enjoyment under his tenancy and also trespass to the premises. If so, it was also conduct which interfered with the plaintiff's business; in other words, his means of livelihood.

Accordingly, this Court is presented with a set of facts which cries out for intervention by interlocutory mandatory relief to preserve the *status quo* prevailing just before the alleged wrongful acts occurred.

However, in deciding what precise form that relief should take, I must have regard to the interests of all parties concerned, how best they may be protected, always keeping in mind the foreseeable positions at the trial, considerations of hardship, inconvenience in the meantime, and any other relevant discretionary factors.

In the result, on the usual undertaking as to damages by the plaintiff, to be reinforced by the deposit in Court of the issue document of title relating to his home, No. 34, Jalan Sri Bahari, Penang, within 1 week from date hereof, I make an order in terms of prayers (1) and (2) of the application but the operation of the same must be suspended until midnight on 31 October 1986, that being the time of expiry of D.2's purported lease dated 1 November 1984 *(Price's Patent Candle Co. Ltd. v. London County Council* [1908] 2 Ch 526).

In the meanwhile, and again on the Plaintiff's undertaking aforesaid, D.2, its servants and/or agents are hereby restrained, by injunction until further order, from assigning or subletting or permitting anyone to use or occupy the premises or any part thereof. The defendants must pay to the plaintiff the costs of this application. There will also be an order for early trial.

Also found at [1986] 1 CLJ 44